IN THE MATTER OF ARBITRATION BETWEEN

MINNESOTA TEAMSTERS PUBLIC AND LAW ENFORCEMENT UNION, LOCAL NO. 320

(Union)

and

INDEPENDENT SCHOOL DISTRICT # 200
Hastings, MN

(Employer)

DECISION AND AWARD

BMS CASE NO: 15-PA-0509

ARBITRATOR: JAMES N. ABELSEN

HEARING: September 23, 2015

POST HEARING BRIEFS RECEIVED: October 9, 2015

APPEARANCES:

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INTRODUCTION

This matter came on for hearing on September 23, 2015 at the administrative offices of Independent School District #200 in Hastings, Minnesota. The parties submitted post hearing briefs on October 9, 2015, at which time the record was closed.

The parties agreed that there were no procedural defects, no issues of arbitrability, and that this matter was properly before the arbitrator.

ISSUE(S) PRESENTED BY THE PARTIES

Both parties proposed a statement of the issues, which when combined, is as follows: Did the Employer have just cause pursuant to Article XIV Section 1 of the Collective Bargaining Agreement to terminate the Grievant's employment? If not, what is the appropriate remedy?

RELEVANT FACTS AND BACKGROUND

The Union and Employer are parties to a Collective Bargaining Agreement covering the period of time July 1, 2014 through June 30, 2016.

The Grievant began employment with the school district in 2005 as a pupil support assistant, a paraprofessional position, and worked in that capacity without incident for close to two years. In 2007 he was employed by the District as a full time custodian, and held that position until his termination on December 21, 2014. During that period of employment the Grievant had two relatively minor incidents, one resulting in a verbal reprimand and the other a referral to a psychologist for an apparent anger issue.

At the time of his termination the Grievant was assigned to Hastings Middle School, where he worked the 2:30 p.m. to 10:30 p.m. shift, Monday through Friday.

On December 10, 2014, the Grievant was working his regular shift and was engaged at some point in unclogging a plugged toilet using a plunger and chemicals. He described the work as being hot, tiring, and smelly. After completing that chore, at approximately 8:20 p.m. (as recorded by the District's security cameras), the grievant placed a bag of garbage in the hallway, did a few other tasks which took about five minutes, and then took the bag of garbage out the

door to the dumpster. The Grievant remained outside for a little less than two minutes (again, as recorded and timed by the District's security cameras), and then reentered the building.

As he reentered the building and walked down the hallway, he passed several co- workers who detected what they believed to be a strong odor of marijuana coming from the Grievant. Other custodians who came into the area shortly after the Grievant passed by, including the lead custodian, detected the same odor of marijuana in the area.

Near the end of the evening shift the lead custodian reported the incident to his supervisor by email, who then notified his supervisor in District Administration. At the direction of the Superintendent an investigation was undertaken by the Coordinator of District Services, Deanna Werner. Ms. Werner reviewed the videos showing the movement of the Grievant and other custodians, she personally determined that a trip to the dumpster should take no more than thirty seconds, she interviewed all those working in the building that night, and essentially confirmed what had been reported.

Ms. Werner then met with the Grievant and gave him an opportunity to explain. He denied using marijuana, and claimed he "did not smoke". He offered as an explanation that "he was unplugging a toilet prior to going on break and maybe it was the smell from the plumbing issue he was working on".[1] At the end of the discussion the Grievant asked Ms. Werner if the district wanted him to take a drug test, to which she replied, "We indicated to him that we did not want him to be drug tested at this time" (Employer Ex. 7).[2]

Ms. Werner then reported her findings to the Superintendent, indicating that in her judgment there was a "high probability" that the Grievant had used marijuana on school district property. The Superintendent received her report and reviewed the investigatory data, including the witness summaries and the video. He then met with the Grievant, reviewed all the evidence

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[1] At the arbitration hearing the Grievant explained that he stayed outside a bit longer than necessary to cool off and recover from his unpleasant toilet cleaning task.

[2] This brief exchange about drug testing is a reference to School District policy #416 "Drug and Alcohol Testing". In brief, this policy provides in part, and paraphrased, the following:

- The use or possession of non-prescribed drugs is prohibited during the workday on or off school district property.
- Any employee who violates the policy is subject to discipline which includes, but is not limited to, suspension and discharge.
- The School District may request or require any employee to submit to drug and alcohol testing, but does not have a duty to request or require any employee to undergo testing.
- If the district does drug test an employee, and the test is positive for drug use, and that test is confirmed with a retest, the district may not discharge an employee who is not a bus driver if this is a first offense and the employee complies with certain required follow up conditions.

with him, and concluded the meeting by terminating the Grievant's employment effective December 22, 2014, subject to School Board approval.

Prior to the School Board meeting at which the Grievant's termination was to be approved, the Superintendent asked Ms. Werner to meet once more with the custodian witnesses to make sure they were absolutely certain, that in their minds, the Grievant had been out of the building long enough to have smoked marijuana, and that they were absolutely certain that when the Grievant came back inside he exuded a strong odor of marijuana.

The follow up interviews conducted by Ms. Werner (Employer Ex. 10-13) confirmed the custodians original reports and confirmed her earlier conclusion that the only reasonable explanation for the smell of marijuana was that the Grievant had extended his trip to the dumpster by almost ninety seconds, during which time he smoked marijuana in violation of School District Policy Number 416.

In that the interviews confirmed what had been reported earlier, the Superintendent concluded that his initial decision was appropriate, and his decision was then confirmed and approved by the school board.

EMPLOYER'S POSITION

The Employer contends that the use of drugs by the Grievant was clearly established by the testimony of his co-workers and the thorough investigation by district officials, and that such use was a clear violation of school district policy. Therefore his termination was for "just cause" as is required by Article XIV, Section 1, of the Collective Bargaining Agreement.

Testimony was presented by four co-workers of the Grievant, two of whom testified that they were either in close proximity to the Grievant when he returned from his two minute trip to the dumpster and were absolutely certain he smelled of marijuana when he returned, or were in the vicinity he walked through and were confident they smelled marijuana immediately after he passed through.

Each of these individuals had significant experience in their lives with the smell of marijuana, and all were absolutely convinced that what they were smelling was marijuana. There was no indication of any animosity toward the Grievant, they are all respected, loyal and

valued employees, none of them were anxious to make this report against a fellow employee, but all felt it was simply the right thing to do.

The Grievant offered no explanation for the smell other than that it may have been a lingering odor from his work unplugging a badly plugged toilet. That, however, could not be the case, argues the Employer, since the Grievant was in close proximity to one or more fellow custodians in a small enclosed office after the toilet unplugging and before the trip to the dumpster, and there was no odor detected by anyone at that time. The odor of marijuana was not present until the Grievant returned from taking garbage to the dumpster.

The District's Drug and Alcohol Testing Policy (Union Ex. 7) provides in part, and which is here paraphrased, that (a) if an employee violates the District rule prohibiting the use or possession of drugs during the work day, even if the drug use occurs off school district property, the employee may be terminated. And (b) if the District has reasonable suspicion that an employee has violated the policy, the District may, but is not required to, request or require an employee to undergo drug testing. And (c) if a test is given and the employee tests positive, and the test result is confirmed, the employee is subject to discipline but may not be terminated if the positive test is the first such result for the employee.

The District chose not to request or require the Grievant to undergo testing, which was their right, since they believed there was more than adequate proof obtained through investigation and witness statements, that he had violated the drug use policy. Additionally, they believed that since marijuana remains in a person's system for many days or weeks, a positive test result could not establish that the use of drugs took place on district property or during the work day. So all a test could prove is that marijuana was in the Grievant's system. For those reasons the District opted to rely on other evidence, i.e. the reliable and unbiased testimony of four witnesses.

The Collective Bargaining Agreement between the parties (Article XIV, Section 3) provides that employees may be terminated "for just cause only". The district contends that this possession and use of an illegal drug at a middle school, during working hours, is particularly serious, given that this is a school setting where modeling drug-free behavior is crucial, and therefore termination was the appropriate remedy.

UNION'S POSITION

The Union makes essentially three arguments in support of its position that the Employer did not have "just cause" to terminate the Grievant. First, the District did not conduct a full and fair investigation before making its decision to terminate the Grievant. Second, the District refused to give a drug test, which would have documented whether or not the Grievant smoked marijuana. And thirdly, the District could not have disciplined the Grievant had they followed their own policy.

The Union contends first of all, that the district did not conduct a full and fair investigation. As evidence of the inadequacy of the investigation they note that a drug test was not obtained, they did not search the Grievant, they did not search his work area, nor did they search the area near the dumpster where the district assumed the marijuana use took place. The extent of the investigation was to interview four co-workers.

The Union also notes that the written summary of the interviews prepared by Ms. Werner deviated in many respects from the testimony of those same people at the hearing. For example, one person's response changed the smell from "strong" to "faint" and the Grievant's condition from "acted strange, walked different" to "nothing unusual". Also noted was the fact that she asked another employee who was in the dumpster area shortly after the Grievant, if he smelled marijuana and he said "no". The extent of the investigation which the District offered as proof consisted of a marijuana smell that ranged from "strong" to "faint", a comment that he didn't act "normal", and others who said he "smiled" and "seemed happy", which was unusual for him.

The Union next argues that even though the District has no legal duty to offer or require a drug test, their unwillingness to do so, when the Grievant indicated his willingness to take the test, is evidence that they were uninterested in pursuing any evidence that could have helped the Grievant. This refusal to obtain evidence that could exonerate the Grievant, but could also prove his guilt, is evidence that the Employer failed to conduct a full, fair and unbiased investigation. They argue that when an Employer chooses to exact the ultimate discipline of termination, and relies only on circumstantial evidence when a drug test is available, is an incomplete investigation and is unjust and unfair.

Finally the Union argues that had the Employer followed its own policy of drug testing they could not have terminated the Grievant. As noted, the District's Drug and Alcohol Testing policy does not require testing, but it does provide that reasonable suspicion of drug use or possession is a basis for testing. Yet the District ignored its own policy and refused to take a step which would have saved the Grievant from termination. Had they tested, as the Grievant essentially requested, if the test had been negative the Grievant would have been exonerated. And if it had been positive, and retested as positive, the District would be prohibited by that same policy from terminating the Grievant since this would have been his first positive test (Article IV, Sec. 4, Sub Sec. F, Para 3).

The Union believes that this process which led to the termination of the grievant was based on suspicion that was not confirmed. It could easily have been confirmed or disproved by a drug test which the Employer refused to give, and which, in either case would have resulted in the Grievant not being discharged. This deliberate refusal to choose a path which would preserve the Grievant's job, particularly when he essentially agreed to take a test, is evidence that the termination was unfair and unjust.

DISCUSSION AND ANALYSIS

THE INVESTIGATION AND THE EMPLOYER'S PROOF

In summary, the evidence supporting the termination decision consisted primarily of testimony from four of the Grievant's fellow custodians, all of whom reported that on the evening of December 10, 2014 the Grievant left the building to deposit trash in the dumpster, a task that should take no more than thirty seconds. Video evidence shows that he left the building at approximately 8:25 p.m. and did not return until 8:27 p.m., a period of two minutes. When he returned, he passed by two of his fellow custodians who later reported that they immediately smelled marijuana as the Grievant passed by. They also reported that he seemed friendlier, which was somewhat unusual for him. Less than a minute later a third custodian walked down that same hallway and reported later that he too noticed a strong smell of marijuana. A little less than ten minutes after that a fourth custodian entered that same hallway, and she too reported that she smelled marijuana.

All four custodians testified that at various times in their lives they each had had many occasions to be in the presence of people who smoked marijuana, the smell was distinct, nothing else smells like it, and they were absolutely certain that what they smelled that evening was marijuana. That testimony was essentially what they each reported to Ms. Werner when they were interviewed during her investigation.

When the Grievant was interviewed he denied using or being under the influence of marijuana on the night in question. When asked about the smell reported by the others he responded that "he was unplugging a toilet prior to going on break, maybe it was the smell from the plumbing issue he was working on" (Emp Ex. 7). He also said that he doesn't smoke so the smell could not have been a cigarette, and that there was no one else outside with him, and he saw no one in the area smoking anything.

While the Union argues that the investigation by the Employer was flawed and the testimony was weak and inconsistent, the reality is that the Employer did conduct a very thorough and unbiased investigation. And the fact that the observations of the witnesses varied, and the fact that the terminology they used when interviewed by Ms. Werner differed in some respects from the terminology used at the hearing, does not make their testimony unreliable. Everyone who had direct knowledge of what happened that evening was interviewed at least twice and there were no significant inconsistencies. Additionally, videos substantiated the accuracy of timelines and the movement of all those involved, and the Grievant offered no reasonable explanation to refute the witness's testimony. The only reasonable conclusion then, is that the District clearly established that the Grievant violated School District policy.

THE DECISION TO TERMINATE

So while district administration investigated as thoroughly as they could, and arrived at a conclusion supported by the evidence, the Collective Bargaining Agreement between the parties requires that the Employer's decision on what to do with that evidence, and what discipline should be imposed, must be a decision that under all the circumstances is fair and just. In particular, was it a fair and just decision for the Employer to terminate the Grievant when less severe options were available, and when the District has a drug testing policy that seems to

suggest that immediate termination for a first offense may not be the best option. And especially when, as in this case, the Grievant indicated a willingness, and almost a request to have the test taken.[3]

The District's policy on DRUG AND ALCOHOL TESTING provides in relevant part as follows:

> ***Purpose***
> *(t)he purpose of this policy is to provide authority so that the school board may require all employees.....to submit to drug and alcohol testing.....(Art I, Sec. B.)*
>
> ***General Statement of Policy***
> *The use, possession, sale, purchase, transfer, or dispensing of any drugs not medically prescribed is prohibited on school district property....Use of drugs which are not medically prescribed is also prohibited throughout the school or work day, including lunch or other breaks, whether or not the employee is on or off school district property....(Art II, Sec. C).*
>
> *Any employee who violates this section shall be subject to discipline which includes, but is not limited to, immediate suspension without pay and immediate discharge....(Sec. E.)*
>
> ***Drug and Alcohol Testing for other Employees***
> *....The school district does not have a legal duty to request or require any employee....to undergo drug and alcohol testing as authorized in this policy....(Art IV.)*
>
> *The school district will not request or require an employee....whose position does not require a commercial driver's license to undergo drug and alcohol testing on an arbitrary and capricious basis....(Art IV, Sec. A.1.b.)*
>
> ***Reasonable Suspicion Testing***
> *The school district may request or require any employee to undergo drug and alcohol testing if the school district has a reasonable suspicion that the employee has violated the school district's written work rules prohibiting the use, possession, sale, or transfer of drugs or alcohol while the employee is working or while the employee is in school district's premises....(Art IV, Sec. A.4.b.)*
>
> ***No Legal Duty to Test***
> *The school district does not have a legal duty to request or require any employee .....whose position does not require a commercial driver's license to undergo drug and alcohol testing....(Art 4, Sec. B.)*

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[3] In regard to that claim, Ms. Werner's notes from her interview of the Grievant conclude with this:

> "Mr. Huberty (the Director of Building and Maintenance) then gave Mr. Fuchs a letter stating he was being placed on Paid Administrative Leave pending further investigation of this matter. At that time Mr. Fuchs asked if we wanted him to take a drug test. We indicated to him that we did not want him to be drug tested at this time."

Discharge and Discipline of Employees whose Positions Do Not Require a Commercial Driver's License....*(Art 4, Sec. F.)*
In the case of a positive test result on a confirmatory test, the employee shall be subject to discipline which includes, but is not limited to, immediate suspension without pay and immediate discharge, pursuant to the provisions of this policy. (Art 4, Sec. F.2.)

The school district may not discharge an employee for whom a positive test result on a confirmatory test was the first such result for the employee on a drug or alcohol test requested by the school district, unless the following conditions have been met: (Art 4, Sec F.3.)

a) The school district has first given the employee an opportunity to participate in ... either a drug or alcohol counseling or rehabilitation program ....; and (Art 4, Sec. F.3.2.)

b) The employee has either refused to participate in the counseling or rehabilitation program or has failed to successfully complete the program, as evidenced by withdrawal from the program before its completion or by a positive test result on a confirmatory test after completion of the program. (Art 4, Sec. F.3.b.)

As this policy makes clear, the district was not obligated to test the Grievant, and there is no provision or process by which the Grievant could force the district to have him tested. It is, according to the policy, completely discretionary with the district.

In this case however, the employee essentially asked, or indicated a willingness to be drug tested. And as the policy makes clear, since this would have been the first such test for the Grievant, no matter what the test result was, either positive or negative, the district could not have terminated him as long as he followed up with the required counseling or rehabilitation.

THE REQUIREMENT OF "JUST CAUSE" IN A PUBLIC EMPLOYEE TERMINATION CASE

The requirement for just cause is such a basic and long standing principle in termination cases that there is an overwhelming amount of literature, arbitration cases, court decisions, and treatises on the subject. It is a concept subject to widely varying interpretations depending on the circumstances of the case, the employer's business, the employee's position, the nature of the employment relationship, and a whole host of overlapping and interrelated factors.[4] But

[4] For a compilation of materials see Elkouri and Elkouri: How Arbitration Works, Seventh Edition; ch.15.2.A.i.ii, and St. Antoine, Theodore, The Common Law of the Workplace Sec. 6.1.

ultimately each situation must be looked at independently to determine if the employer can, in good faith, (a) articulate a legitimate non-discriminatory reason for terminating an individual's employment, (b) support that reason with persuasive evidence, and (c) show that the punishment exacted was fair in that particular situation, at that time, in that business, and in light of all the facts and circumstances surrounding the incident which led to the termination.

One treatise described the "just cause" reasons for discipline as follows:

> "What constitutes just cause for discipline? Obviously there are some offenses universally recognized as serious enough to warrant....discharge for a first offense: physical assault, sabotage, theft, major dishonesty, flagrant insubordination, and so on.... (j)ust cause requires the employer to have an appropriate rule and to use 'corrective discipline'/'progressive discipline', meaning that the employer should gradually increase penalties for subsequent offenses. The purposes of those requirements are to provide the employee with ample warning and full opportunity to correct problems." *(Labor and Employment Arbitration, Nolan, Dennis R., 2d Ed., (2006), pg. 305)*

Another described "just cause" in these terms:

> "A given 'cause' may justify some types of discipline but not others. The employer's chosen level of discipline must be 'just'. The level of discipline permitted by the just cause principle will depend on many factors, including the nature and consequences of the employee's offense, the clarity... of rules, (and) the length and quality of the employees work record..... Discipline must bear some reasonable relation to the seriousness or frequency of the offense.... Unless otherwise agreed, discipline for all but the most serious offenses must be imposed in gradually increasing levels. The primary object of discipline is to correct rather than to punish. Thus, for most offenses, employers should use one or more warnings before suspensions, and suspension before discharge." *(The Common Law of the Workplace, 2d Ed, (2005), Sec. 6.7, St. Antoine, Theodore)*

That then is the framework for the evaluation process to determine if, in this case, the Employer had just cause to terminate the Grievant.

A. <u>Did the employer articulate a legitimate non-discriminatory reason for terminating the Grievant's employment?</u>

Clearly it did. The school district has a well understood and publicized policy prohibiting the use of illicit drugs by school employees during the work day, whether on or off school

property. The Grievant was observed leaving the building for approximately two minutes on a chore that should take no more than thirty seconds, and when he returned he had a strong smell of marijuana on his person which was noticed by several of his co-workers.

All the co-workers who testified had experienced the smell of marijuana in the past, and all testified that they were absolutely certain that the smell was that of marijuana. There was no evidence that the witnesses had any animosity towards the Grievant, they had nothing to gain by coming forward, and their explanations of how they were able to so positively identify the smell as marijuana were all genuine and persuasive. Other credible testimony established that the smell was not present before the Grievant left the building but the smell of marijuana was strong immediately after he returned.

The Grievant's explanation during the interviews and during his testimony as to the source of the smell was not convincing, and on the basis of that unrefuted, non-discriminatory evidence that the Grievant had violated school policy, the Employer established that they did have a legitimate, non-discriminatory reason for their action.

B. <u>Did the employer support the termination with persuasive evidence?</u>

As noted, when the Grievant returned from his outside chore he walked past two of his co-workers. Both immediately smelled a strong odor of marijuana on the Grievant. Two other co-workers came into the vicinity shortly thereafter and both of them also noticed the smell of marijuana in the area that the Grievant had passed through. All four co-workers described in detail how they had become familiar with the smell of marijuana, and all four testified that what they smelled was marijuana and could not have been anything else.

The Grievant's only explanation for the smell was that it may have come from his working on a plugged toilet earlier in the evening, but that was refuted by the testimony of a co-worker who was with the Grievant in an enclosed space after the Grievant's toilet cleaning chore and before the Grievant went outside, and there was no odor that he detected during that time.

The decision to terminate the Grievant for violating school district policy was therefore supported by clear and convincing evidence that stood unrefuted.

C. <u>Under the circumstances, was the punishment of termination fair and for just cause?</u>

In that the Employer's policy on drug use or possession was violated by the Grievant, and in that the violation was established by clear and convincing evidence, and in that the prescribed penalty for such violation subjects the violator to discipline which includes immediate discharge, the question then, is whether or not the decision in this case to exact the ultimate penalty of termination was a fair and just penalty.

First to be considered in determining the fairness or justness of the penalty is the seriousness of the violation and what extenuating circumstances may exist.

(i) The Grievant was out of the building for no more than 90 seconds and presumably smoked what a co-worker referred to as a "one-hitter". This violation occurred at about 8:30 at night, with no students, educational staff, or members of the public in the building or anywhere in the vicinity.

According to the testimony, after he returned to work he completed his shift without incident and showed no signs of being impaired in any way. He was able to satisfactorily complete his work, he was not disruptive in any way, and other than exuding a smell of marijuana there was no reason any of his co-workers would have noticed anything, other than a demeanor which was described as more pleasant than normal.

Under the circumstances the decision to terminate the Grievant seems particularly harsh.

(ii) The Grievant had a reasonably long employment history with the district. He began as a paraprofessional in 2005, he coached swimming at some point, and became a custodian in 2007. During those nine years with the district he had two reported "incidents". One involved his unexplained absence at a scheduled event, which resulted in a reprimand, and the other involved several swim team members, which resulted in a required counseling session. There is no indication either of those matters involved drugs or alcohol, and as the superintendent testified, those incidents did not affect his decision to terminate the Grievant.

On the basis of that employment history, the decision again, seems unnecessarily harsh.

(iii) When the Employer does not have a zero tolerance policy for drug use, but in fact has established what is essentially a progressive discipline policy which would require counseling or treatment as opposed to immediate termination, and the Employer chooses not to use that process, that too raises the question of fairness.

This choice by the Employer to terminate versus treat, which of course is their choice, arguably runs counter to what is clearly becoming recognized in the court system and society in general, that treatment is far preferable to punishment. Several states have legalized recreational marijuana, and many federal courts now have pre-trial diversion programs that function much like state drug courts, which provide counseling and rehabilitation to drug users as an alternative to punishment.

The school district's written policy would suggest that the school district also believes that a first offender should have the opportunity for counseling and rehabilitation instead of immediate termination. So in light of this policy, this decision to terminate seems particularly punitive.

(iv) During the Grievant's initial interview with Ms. Werner, she wrote,

> "…. he asked if we wanted him to take a drug test. We indicated to him that we did not want him to be drug tested at that time" (Emp. Ex. 7).

By any reasonable interpretation of that exchange, the Grievant asked, or at least indicated a willingness to take a drug test. The district refused.

When the school district has adopted a drug use policy which describes a process of counseling and rehabilitation prior to termination, and they not only choose to not use that process, but refuse to use that process when an accused asks for it, suggests again that the penalty of termination was unnecessarily harsh.

As discussed earlier, there are literally thousands of arbitration decisions and court cases on the issue of "just cause". But of course in each one the type of work is different, the facts are

different, the history of the parties is different, and the reason for discharge is different. Termination cases can be found going either way in cases which appear to be nearly identical in their facts, so it is not unexpected that there is really no clearly binding or strongly influential precedence which necessarily applies to this specific case. As one commentator stated:

> "In a grievance arising out of a termination, the burden of demonstrating just cause falls on the employer. In deciding such an issue, the arbitrator looks afresh or de novo at the facts and circumstances to determine not only whether the employer can in good faith 'articulate' a legitimate reason for the discharge, but also whether or not....the discipline assessed was fair in light of traditional notions of progressive discipline." *(Richard I. Bloch, The Changing Face of Just Cause, page 52, Proceedings of the 2000 Annual Meeting, National Academy of Arbitrators)*

Another said this:

> "While arbitrators typically look to a host of factors in making just cause determinations, they observe several bedrock principles. First, misconduct or inadequacy, in order to be a basis for discipline or discharge, must be job related. .... Second, the employer's response must be non-discriminatory. Third, any discipline imposed must be corrective rather than punitive. The last principle reflects the reasonable premise that while an employer has every right and reason to expect an employee to conform to the employer's business needs, the employer has no license simply to punish an employee. It reflects a belief that discipline of increasing severity will convey to an employee the message that he or she must, for job retention, change ways." *(Daniel G. Collins, Just Cause and the Troubled Employee, page 23, proceedings of the 1988 Annual Meeting, National Academy of Arbitrators)*

FINDINGS

1. The Employer has established by a clear preponderance of the evidence that the Grievant used or possessed marijuana, a controlled substance, on school district property during his work hours, a violation of school district policy. This violation subjects the Grievant to discipline, including but not limited to suspension without pay and immediate discharge.

2. The Employer's decision to terminate the employment of the Grievant was non-discriminatory and was a disciplinary option authorized by the language of District policy.

3. Notwithstanding findings 1 and 2, for the following reasons the decision of the Employer to terminate the Grievant was not for "just cause" as required by the parties Collective Bargaining Agreement:

   a) The Grievant was a long term employee with a reasonably good employment record. He committed the policy violation during his evening work shift when no students, educational staff, or members of the public were in the building. His use of marijuana was a first offense, it was accomplished in less than 90 seconds outside the building and outside the presence of anyone else, and did not have a negative effect on his work or on his co-workers. To discharge the Grievant under these circumstances is unfair and unjust.

   b) The employer does not have an articulated policy of zero tolerance for violations of this nature, but in fact has a policy which favors a progressive form of discipline for first offenders. Nevertheless, the employer chose the ultimate penalty of termination and offered no reasonable explanation for that decision when a lesser form of discipline was available and provided for in the employer's policy. To discharge the Grievant under these circumstances is unfair and unjust.

   c) The Employer was faced with a decision as to what the form of discipline should be. The Employer had a choice to terminate the Grievant or choose a discipline that would lead to counseling and rehabilitation. As a public employer, with obligations not only to its students but also to its employees, it would be reasonable to expect, that given a choice between terminating a long term employee for a policy violation that had no negative effect on anyone, versus helping that employee address whatever issues he may be having, the school district would choose the latter. They chose not to do that, which is yet another indication that the decision to terminate was unfair and unjust.

   d) During the investigation the Grievant essentially requested, or at least indicated a willingness to take a drug test. If that request had been granted, being that this was the Grievant's first offense he would have kept his job and been directed to a

counselor or rehabilitation. The employer refused. The request was reasonable, it was allowed if not implicitly encouraged by school district policy, and to refuse that request without any reasonable explanation, makes the termination action unfair and unjust.

DECISION AND AWARD

Based on the record as a whole and for the reasons cited herein, the grievance is SUSTAINED and the discipline imposed is reduced to a ten (10) day suspension without pay. Grievant is entitled to be returned to his former employment with all seniority rights restored, and following the suspension period, is to be made whole for all lost wages and benefits, reduced by any wages earned during the termination period and by any unemployment compensation or other compensation received by the Grievant as a result of the termination. The intent being to make the Grievant financially whole.

Jurisdiction is retained for sixty (60) days in order for the parties to calculate the back pay and benefits.

Date: November 1, 2015

James N. Abelsen, Arbitrator